

**Oct 10, 2018**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JEREMIAH PARK,

Plaintiff,

v.

JO ELLA PHILLIPS; AND  
FRANK SMITH,

Defendants.

No. 4:18-CV-05114-EFS

**ORDER DENYING TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

**Clerk's Office Action Required**

Before the Court, without oral argument, is Plaintiff Jeremiah Park's First Amended Complaint, ECF No. 20, and Memorandum for a Temporary Restraining Order and Preliminary Injunction, ECF No. 21. Plaintiff also filed a supporting declaration. ECF No. 22. After reviewing the submitted materials and relevant authority, the Court is fully informed. The Court denies Plaintiff's Memorandum for a Temporary Restraining Order and Preliminary Injunction. The reasons for the Court's Order are set forth below.

**I. BACKGROUND**

Plaintiff Jeremiah Park Phillips is currently incarcerated at the Washington State Penitentiary. On August 17, 2018, Plaintiff filed his First Amended Complaint. ECF No. 20. On September 6, 2018, Plaintiff also filed a Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 21, and an accompanying

1 declaration, ECF No. 22. Plaintiff alleges that he was not given proper medical  
2 treatment by Defendant Jo Ella Phillips, a Physician's Assistant at the Washington  
3 State Penitentiary, for his genital herpes and an eye injury. *See* ECF No. 22 & 31.  
4 He also asserts that she was sexually interested in him and conducted Plaintiff's  
5 rectal and genital examinations in a sexually "sadis[tic]" manner. *See* ECF No. 22.  
6 Plaintiff also joins Frank John Smith, Family Medical Director at the Washington  
7 State Penitentiary as a defendant. He requests an order allowing him to be  
8 transferred to a different unit so that he may be seen by a different medical provider.  
9 ECF No. 22.

10 On September 7, 2018 the Court ordered defendants Jo Ella Phillips and  
11 Frank Smith to respond. ECF No. 24. Defendants complied with the Order and  
12 submitted a response to Plaintiff's motion for a preliminary injunction and  
13 temporary restraining order. ECF No. 30. They each submitted declarations in  
14 support of their response. ECF Nos. 28 & 29. On October 5, 2018, Plaintiff filed an  
15 reply, labeled "Answer to Defendants' Response to Plaintiff's Motion for Injunctive  
16 Relief. ECF No. 31.

## 17 II. ANALYSIS

### 18 A. **Motion for Preliminary Injunction**

19 "A plaintiff seeking a preliminary injunction must establish that he is likely  
20 to succeed on the merits, that he is likely to suffer irreparable harm in the absence  
21 of preliminary relief, that the balance of equities tips in his favor, and that an  
22 injunction is in the public interest." *Am. Freedom Def. Initiative v. King Cty.*, 796

1 F.3d 1165, 1168 (9th Cir. 2015) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555  
2 U.S. 7, 20 (2008)). The purpose of preliminary injunctive relief is to preserve the  
3 status quo or to prevent irreparable injury pending the resolution of the underlying  
4 claim. *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.  
5 1984). The moving party bears the burden of meeting all prongs of the *Winter* test.  
6 *Alliance for the Wild Rockies v. Cottrell*, 632 F.2d 1127, 1135 (9th Cir. 2011).

7 A preliminary injunction is an extraordinary remedy, *Winter*, 555 U.S. at 24,  
8 and preliminary injunctions that order a party to act and alter the status quo are  
9 “particularly disfavored.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH &*  
10 *Co.*, 571 F.3d 873, 879 (9th Cir. 2009). Where “mandatory,” as opposed to prohibitory  
11 preliminary relief is sought, the Ninth Circuit has noted that courts should be  
12 “extremely cautious.” *Martin v. International Olympic Comm.*, 740 F.2d 670, 675  
13 (9th Cir. 1984). Thus, an award of mandatory preliminary relief is not to be granted  
14 unless both the facts and the law clearly favor the moving party and extreme or very  
15 serious damage will result. *See Anderson v. United States*, 612 F.2d 1112, 115 (9th  
16 Cir. 1979).

17 Finally, the Prison Litigation Reform Act (PLRA) mandates that prisoner  
18 litigants must satisfy additional requirements when seeking preliminary injunctive  
19 relief against prison officials. The PLRA provides, in relevant part:

20 Preliminary injunctive relief must be narrowly drawn, extend no further  
21 than necessary to correct the harm the court finds requires preliminary  
22 relief, and be the least intrusive means necessary to correct the harm  
the court finds requires preliminary relief, and be the least intrusive  
means necessary to correct that harm. The court shall give substantial  
weight to any adverse impact on public safety or the operation of a

1 criminal justice system caused by the preliminary relief and shall  
2 respect the principles of comity set out in paragraph (1)(B) in tailoring  
3 any preliminary relief.

4 18 U.S.C.A. § 3626(a)(2). Thus, this section limits the Court's power to grant  
5 preliminary injunctive relief to inmates. *See Gilmore v. California*, 220 F.3d 987, 998  
6 (9th Cir. 2000).

7 Plaintiff has not shown that he is likely to succeed on the underlying merits  
8 of his 42 U.S.C. § 1983 claim. Plaintiff must "allege acts or omissions sufficiently  
9 harmful to evidence deliberate indifference to his serious medical needs." *Estelle v.*  
10 *Gamble*, 429 U.S. 97, 106 (1976); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir  
11 2004). But "deliberate indifference is a high legal standard, one which requires a  
12 showing of more than malpractice or negligence." *Toguchi*, 391 at at 1060. To  
13 evidence deliberate indifference, Plaintiff must show that the defendants knew of  
14 and disregarded excessive risks to his health and safety. *Id.* at 1057.

15 Plaintiff has not demonstrated that the defendants were deliberately  
16 indifferent in treating his genital herpes. Plaintiff himself states that he was treated  
17 several times by Defendant Phillips between May 2017 and December 2017. *See* ECF  
18 Nos. 20 & 31. Defendants summarized his medical records and stated that during  
19 the period in question there was not a sufficient herpes lesion to take a culture  
20 sample from. *See* ECF Nos. 28, 29, & 30. Defendants explained that in order to  
21 prescribe herpes medication they must be able to obtain a culture sample and  
22 confirm the presence of a herpes outbreak. ECF Nos. 28, 29 & 30. Records submitted  
by Plaintiff show that this was explained to him. ECF No. 31 at 13. He was

1 prescribed medication in December of 2017 after Defendant Phillips was able to  
2 obtain a culture sample and confirm the presence of a herpes outbreak. ECF Nos.  
3 28, 29, & 30. Plaintiff has therefore not shown deliberate indifference. Without more  
4 evidence from Plaintiff, the Court cannot conclude that he is likely to succeed on the  
5 merits of his claim.

6 Plaintiff also alleges that Defendant Phillips was “sexually motivated”  
7 towards him when she gave him a rectal and genital examination. “After  
8 incarceration, only unnecessary and wanton infliction of pain constitutes cruel and  
9 unusual punishment forbidden by the Eighth Amendment.” *Watison v. Carter*, 668  
10 F.3d 1108, 1112 (9th Cir. 2012). Defendants assert that Plaintiff could always refuse  
11 treatment and that genital and rectal examinations—which are standard for the  
12 diagnosis of herpes—involve digitally manipulating the genital rectal areas. *See, e.g.,*  
13 *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997) (eight amendment does not  
14 prohibit female guards from performing visual body cavity searches on male inmates  
15 or watching male inmates shower, despite an allegation that the guards “gawked” at  
16 him); *Grummett v. Rushen*, 779 F.2d 491, 494 n.1 (9th Cir. 1985) (prison’s policy of  
17 allowing female guards to observe male’s inmates disrobing, showering, using the  
18 toilet, and being strip searched was not the “type of shocking and barbarous  
19 treatment protected against by the [E]ighth [A]mendment.”).

20 Plaintiff has also not shown that he is likely to suffer irreparable harm  
21 regarding his genital herpes or eye injury, *Winter*, 55 U.S. at 20, as he was prescribed  
22 medication for both conditions. ECF Nos. 20 & 22. Plaintiff has not demonstrated

1 that Defendant Phillips will withdraw Plaintiff's treatment or stop her practice of  
2 having chaperones present while conducting genital or rectal exams. Plaintiff's  
3 requested remedy, transferring his unit so he may be treated by another medical  
4 provider, is also not the "least intrusive means to address the harm" he allegedly  
5 suffers. 18 U.S.C.A. § 3626(a)(2). Plaintiff states that he has scarring on his genitals  
6 and now must wear eyeglasses because the defendants failed to adequately treat  
7 him. *See* ECF No. 22. However, providing him with a new medical provider does not  
8 remedy these damages.

9 Finally, absent more evidence, the Court is hesitant to order the mandatory  
10 relief sought by Plaintiff. The Court understands that providing adequate care to  
11 inmates is a massive undertaking. "Prison administration is...a task that has been  
12 committed to the responsibility of [the executive and legislative] branches, and  
13 separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*,  
14 482 U.S. 78, 85 (1987). For these reasons, the Plaintiff's request for preliminary  
15 injunctive relief is denied.

#### 16 **B. Temporary Restraining Order**

17 The Ninth Circuit has noted that the analysis for issuance of a temporary  
18 restraining order is "substantially identical" to the analysis for issuance of a  
19 preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d  
20 832, 839 n.7 (9th Cir. 2001). The primary difference between a temporary restraining  
21 order and a preliminary injunction are the duration of the injunction and the  
22 availability of argument prior to the issuance of the injunction. *Bennet v. Medtronic*,

1 Inc., 285 F.3d 801, 804 (9th Cir. 2001). Because the analysis is substantially identical  
2 for the preliminary injunction and temporary restraining order, the Court need not  
3 address the temporary restraining order separately. For this reason, Plaintiff's  
4 request for a temporary restraining order is DENIED.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. 1. Plaintiff's **Memorandum of Law in Support of Plaintiff's**  
7 **Motion for Temporary Restraining Order and Preliminary**  
8 **Injunction, ECF No. 21, is DENIED.**

9 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
10 provide copies to Counsel and Plaintiff.

11 **DATED** this 10<sup>th</sup> day of October 2018.

12  
13 s/Edward F. Shea  
EDWARD F. SHEA  
14 Senior United States District Judge  
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